

(2)
No. 91-251

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PHILOMENA DOOLEY, *et al.*,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether punitive damages are recoverable in an action governed by the Warsaw Convention?

RULE 29.1 LIST

Korean Air Lines Co., Ltd. is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 24 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuk Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Travel Information Service Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunication Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd., Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation—SOGECO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuk Foundation
Inha General Hospital

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IN THE
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UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, KOREAN AIR LINES CO., LTD. (hereinafter KAL), respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the opinion and decision of the Court of Appeals for the District of Columbia Circuit that punitive damages are not recoverable in a case governed by the Warsaw Convention. That opinion is reported at 932 F.2d 1475, 1484-1490 (1991) and is reprinted in the Appendix to the Petition.¹

¹ References to the Petition appear as "Pet."; references to the Appendix to the Petition appear as "Pet. A- ". References to the Appendix hereto appear as "App."

STATEMENT OF THE CASE

1. The Event and the Nature of the Litigation

On September 1, 1983, a Soviet fighter aircraft deliberately fired upon and destroyed a civilian aircraft operating as KAL flight KE007 from New York via Anchorage to Seoul, Korea. This multidistrict litigation involves over 100 death actions brought against Respondent KAL by the representatives of passengers killed when flight KE007 was shot down. All of the actions save one² are governed by the provisions of the Warsaw Convention³ which, as supplemented by the Montreal Agreement,⁴ limits recoverable damages to the sum of \$75,000 per passenger unless it is proved that the deaths of the passengers were proximately caused by the "wilful misconduct" of KAL within the meaning of Article 25 of the Convention.⁵ Upon such proof, the Convention provides that the recoverable damages are not limited to \$75,000 per passenger and the passenger or his representative are then able to

2 One passenger was not involved in "international transportation" as defined by Article 1(2) of the Warsaw Convention.

3 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502 (Warsaw Convention).

4 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) (Montreal Agreement).

5 Article 25 provides:

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

49 Stat. 3020.

recover the full extent of the compensatory damages sustained.

2. The Liability Trial in the District Court

A single liability trial with respect to all pending actions was conducted in the District Court for the District of Columbia, the multidistrict transferee court. At trial the plaintiffs, Petitioners herein, sought to recover the full extent of the compensatory damages sustained by each of them upon proof of "wilful misconduct" in accordance with Article 25 of the Warsaw Convention. They also sought to recover, upon the basis of federal maritime law, punitive damages in the event Article 25 "wilful misconduct" was found by the jury.

The jury returned a verdict that the shooting down of flight KE007 by the Soviet fighter aircraft, and the resultant deaths of the passengers, were proximately caused by the "wilful misconduct" of the flight crew of flight KE007. As only the common issue of liability was tried, no verdict was returned by the jury as to the extent of the compensatory damages sustained by any plaintiff.

Prior to trial, KAL had filed a motion *in limine* to dismiss all punitive damage claims upon the basis that the Warsaw Convention does not authorize or permit an award of punitive damages. The trial court did not rule on the motion until the end of the trial. App. at 2a. After the jury was instructed on the law as to "wilful misconduct" and had retired to deliberate, the trial court announced that if the jury found that the shooting down of flight KE007 was proximately caused by the "wilful misconduct" of the KE007 flight crew, then the trial court would instruct the jury on punitive damages and have the jury deliberate further as to whether punitive damages should be awarded and if so, in what amount. KAL objected on the same legal grounds as set forth in the unrul ed upon motion *in limine* and upon the further ground that if the trial court denied the pending motion to dismiss the punitive damage claims, a choice of law analysis was

required before any instruction could be given to the jury on the subject of punitive damages. App. at 2a-3a. The trial court disagreed, denied the pending motion *in limine* from the bench and instructed the jury in accordance with the law of the forum, the District of Columbia, as to punitive damages without conducting any choice of law analysis. App. at 3a-4a; 6a-8a. In a subsequent and separate verdict, the same jury on the same day awarded plaintiffs collectively the sum of \$50,000,000 in punitive damages. App. at 8a.

3. The Opinion of the Court of Appeals

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the jury verdict of "wilful misconduct" but reversed and set aside the judgment entered on the separate verdict awarding plaintiffs \$50,000,000 in punitive damages. That portion of the judgment of the Court of Appeals affirming the "wilful misconduct" verdict is the subject of a cross-petition for writ of certiorari filed by KAL herein. This brief in opposition addresses only the petition for writ of certiorari filed by Petitioners with respect to the judgment of the Court of Appeals reversing and vacating the punitive damage award.

The Court of Appeals held that the "district court erred . . . in allowing plaintiffs to pursue their punitive damage claims" and vacated the punitive damage award. 932 F.2d at 1490; Pet. A-30. The court properly considered the language of the Warsaw Convention, the negotiations of the drafters, the goals and purposes of the treaty and the interpretations given the Convention by contracting states and concluded

that a monetary liability that is punitive and does not compensate for loss suffered would be contrary to the expectations of the jurists who drafted Article 17 and the contracting states that adopted it.

932 F.2d at 1487; Pet. A-23.

The court noted that its conclusion that the Warsaw Convention does not allow for an award of punitive damages

comports with our obligation to construe the Convention in a manner that will promote uniformity. The uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed a form of liability wholly outside the compensatory scheme of Article 17.

932 F.2d at 1487; Pet. A-23-24 (citations omitted).

The court below expressly did not reach or decide the issue whether the Warsaw Convention cause of action is exclusive of all local law causes of actions since the majority decided simply that "punitive damages are contrary to the Convention." 932 F.2d at 1488; Pet. A-25. In so deciding, the court below agreed with the Court of Appeals for the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991). The Second Circuit in *Lockerbie* also held that the Warsaw Convention provides the exclusive cause of action where the Convention applies. *Lockerbie*, 928 F.2d at 1270. The decision of the Second Circuit is the subject of a petition for a writ of certiorari filed August 12, 1991.

Chief Judge Mikva, in dissenting from the punitive damage decision of the court below, viewed the Warsaw Convention as not barring the recovery of punitive damages under local law but noted that he would "remand the punitive damages question to the district court with instructions to engage in a proper choice of law analysis." 932 F.2d at 1499; Pet A-48.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented for Review Was Not Addressed by the Court Below

Petitioners have presented only the following question for review by the Court:

Does the Warsaw Convention Treaty provide the exclusive cause of action for passenger deaths and injuries in international accidents and bar recovery of punitive damages allowed by applicable federal maritime law?

Pet. at i.

This question, however, was not addressed or decided by the court below, which decided only that the Warsaw Convention bars recovery of punitive damages. In light of this holding, there was no need for the court below to reach the issue whether the Warsaw Convention cause of action is exclusive of causes of action based upon law outside of the Convention. As the question presented by Petitioners cannot be extracted from the opinion and decision below, there is nothing for the Court to review. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991).

In seeking review of the question presented by the petition, *i.e.*, the exclusivity of the Warsaw Convention cause of action, Petitioners attempt to fuse the decision of the court below with that of the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991). The *Lockerbie* court held that the Warsaw Convention creates the exclusive cause of action, preempting all state law causes of action, and does not permit the recovery of punitive damages. Petitioners argue that the court below, in relying upon the *Lockerbie* court's analysis of the Warsaw Convention in relation to the punitive damage portion of the decision, also adopted by implication the *Lockerbie* court's decision that the Warsaw Convention cause of action is exclusive. The court below, however, did not adopt, by implication or oth-

erwise, any part of the *Lockerbie* court's decision regarding the exclusivity of the Warsaw Convention cause of action. In fact, the court below twice referred to the *Lockerbie* court's discussion of the exclusivity issue and expressly declined to reach this question, stating:

In *Lockerbie*, the Second Circuit pointed out that a minority of state courts in the United States view punitive or exemplary damages as serving, at least in part, a "compensatory" function. The court, concluded, however, that the Warsaw Convention preempts all state-law causes of action; otherwise, the uniform application of the Convention would be disrupted by the uneven patchwork of state punitive damages theories . . . *We need not reach this preemption question because plaintiffs here base their claim to punitive damages solely on federal maritime law.*

* * *

Some courts and commentators have concluded that Article 24 preserves independent domestic causes of action based on tort law. Others disagree, taking the view that the Convention, when applicable, provides the exclusive cause of action. *In deciding only that punitive damages are contrary to the Convention, we need not take sides in the exclusivity debate.*

932 F.2d at 1486, 1488 (citations omitted and emphasis added); Pet. A-21-22, 25.

Petitioners erroneously argue that the exclusivity issue is indispensable to the determination of whether punitive damages are recoverable under the Warsaw Convention. As the court below correctly concluded, regardless of what law Petitioners rely upon to support their punitive damage claims, recovery of such damages under any law would be contrary to the Convention and, therefore, cannot be allowed in a Warsaw Convention case. In reaching this conclusion, the

court below analyzed Article 17,⁶ which creates liability for "damage sustained," against the backdrop of the history and purposes of the Convention, and held that Article 17 creates liability for compensatory damages *only*. Because the purpose of punitive damages is "to punish reprehensible conduct and to deter its future occurrence," an award of punitive damages would contravene the compensatory liability scheme created by the Warsaw Convention. *See* 932 F.2d at 1486; A-21. Further, reliance upon law outside of the Convention to support a claim for damages not envisaged by the liability scheme of the Convention is barred by Article 24,⁷ which provides that *any* action for damages can be brought only subject to the conditions and limits of the Convention.

The *Lockerbie* court apparently found it necessary to address the exclusivity issue because the plaintiffs there were claiming punitive damages under various state laws which viewed punitive damage awards as serving a compensatory function. Therefore, the *Lockerbie* plaintiffs argued, an award of punitive damages in such circumstances would not be contrary to the compensatory damage scheme contemplated by Article 17. In rejecting this argument, the *Lockerbie* court held that all state law causes of action are

6 Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

7 Article 24 provides:

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

preempted by the Warsaw Convention. This eliminated any legal basis for the punitive damage claims in the *Lockerbie* case since the Second Circuit also held that punitive damages are not recoverable under the Warsaw Convention.

While the *Lockerbie* court may have found it necessary to determine whether state law punitive damage claims are preempted by the Warsaw Convention cause of action, the court below did not have to reach that issue because the punitive damage claims here were based upon federal maritime law,⁸ and federal courts view punitive damages as retributive in nature.

Petitioners argue, alternatively, that if the court below did not use exclusivity as the basis for barring punitive damages, then Article 17 must be treated as a provision which excludes or limits liability and proof of wilful misconduct serves to remove the compensatory damage "limit" of Article 17, thus allowing punitive damages to be awarded. This argument also must fail because it wholly ignores the intended scope and effect of Article 24 when read together with the purpose of Article 17, which is to create but not to limit liability.

The court below decided, simply, that "punitive damages are contrary to the Convention," whether based on local law or otherwise. 932 F.2d at 1488; Pet. A-25. The question of the exclusivity of the Warsaw Convention cause of action was not addressed or decided in the court below. The Court, therefore, should deny the petition which seeks review of a decision not made by the court below.

8 In presenting their question for review, Petitioners ask the Court to assume that federal maritime law is applicable to the punitive damage claim of each plaintiff and that federal maritime law allows recovery of punitive damages in the context of these actions. See Pet. at 11. These assumptions are baseless. There has been no determination in this case that federal maritime law is applicable to any of plaintiffs' claims or that federal maritime law would even allow recovery of punitive damages as part of plaintiffs' survival actions where the deaths occurred on the high seas. Moreover, the trial court did not even apply federal maritime law to the punitive damage claims. See 932 F.2d at 1495; Pet. A-39-40.

2. The Lower Courts Are in Agreement that Punitive Damages Are Not Recoverable Under the Warsaw Convention

The holding of the court below, that punitive damages are not recoverable in actions governed by the Warsaw Convention, is in accord with the decisions of the only other circuit courts that have addressed the issue. As there is no disagreement among the circuit courts of appeals with respect to the only issue decided by the court below, there is no conflict for the Court to resolve.⁹

Petitioners would have the Court accept that the court below created an exclusion of damages intended to be recoverable under the Convention. Petitioners argue that because the common law allows recovery of punitive damages and the treaty is silent as to their recoverability, the court's holding "constitutes a judicial alteration" of the Warsaw Convention. Pet. at 15. The court below, however, did not create or impose any bar to damages to which Petitioners are entitled under the Convention. Rather, the court honored the Court's precept of "giv[ing] the specific words of the treaty a meaning consistent with the shared expectations of the contracting

9 As the court below did not decide the exclusivity issue, Respondents will not discuss in detail the state of the law in the lower courts with respect to that issue, except to note that Petitioners have failed to demonstrate a conflict with respect to the exclusivity issue as well. The Ninth Circuit cases relied upon by Petitioners do not present a conflict with the Second Circuit's decision in *Lockerbie* because the Ninth Circuit has *never* addressed the issue presented by Petitioners, did not address the issue in the cases relied upon by Petitioners and has never *held* that the Warsaw Convention cause of action is not exclusive. See *Johnson v. American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982).

Likewise, *Sheris v. Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, *cert. denied*, 409 U.S. 878 (1972), is of no precedential value because it relied upon *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), a Second Circuit case which was overruled in 1978 by *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

parties,"¹⁰ by holding that the purposes served by punitive damages are incompatible with the compensatory damage scheme in Article 17 and with the intent of the Convention's drafters. Thus, the court below correctly refused to insert into the treaty a right of recovery not intended by the drafters and not authorized by the language of the treaty. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); see also *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991).

In reaching its decision, the court below analyzed the text of the treaty and concluded that Article 17 creates liability for compensatory damages only. Since Article 24 expressly requires any action for damages to be brought subject to the conditions and limits set forth in the Convention, the court below correctly determined that Article 24 "provides a clear textual basis for concluding that the Convention overrides liability awards that are inconsistent with Article 17." 932 F.2d at 1488; Pet. A-25. The court below further concluded that a finding of wilful misconduct under Article 25 does not create a right to recover punitive damages because the basic liability terms of Article 17 are not "limitations" that can be displaced when wilful misconduct is found. 932 F.2d at 1488-89; Pet. A-26-27. Thus, the court vacated the punitive damage award because punitive damages are outside the "parameters" of the Convention's compensatory damage scheme and "these parameters are not expanded by Articles 24 or 25." 932 F.2d at 1490; Pet. A-29.

In holding that punitive damages were not envisaged by the drafters and signatories to the Convention, the court below recognized that the basic purpose of the treaty was to create a right of recovery against air carriers where none previously existed, while at the same time to limit that recovery. The court properly chose not "to disregard the policy choices made by the Convention's contracting parties." 932 F.2d at 1490; Pet. A-29.

The court below also considered the subsequent interpretation of the Convention by common law signatories and the

10 See *Air France v. Saks*, 470 U.S. 392, 399 (1985).

nature of damages recognized by some civil law signatories. 932 F.2d at 1487; Pet. A-23. Petitioners attempt to create the impression that the court ignored these areas of inquiry in its analysis, yet it is Petitioners who have failed to set forth a single reported case in which a court of any other nation has awarded punitive damages in a Warsaw Convention case. Pet. at 15-16.

Finally, the holding of the court below is consistent with that of the Second and Eleventh Circuits, the only other courts of appeals that have considered the issue whether punitive damages are recoverable under the Warsaw Convention. In *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991), the Eleventh Circuit determined that Article 17 of the Convention creates liability for personal injury and is "entirely compensatory in nature." On this basis, the Eleventh Circuit held that an award of punitive damages would be in conflict with the scheme of liability provided for in the Warsaw Convention. The court there reached its conclusion after an exhaustive analysis of Articles 17, 24 and 25 and the history and goals of the Convention. Likewise, the Second Circuit in *Lockerbie* thoroughly analyzed the text, history and purpose of the Warsaw Convention in holding that punitive damages are barred by the Convention. These courts also noted with approval the decisions of the district courts in *In re Air Crash Disaster at Gander, Newfoundland on December 12, 1985*, 684 F. Supp. 927 (W.D. Ky. 1987) and *Harpalani v. Air India, Inc.*, 634 F. Supp. 797 (N.D. Ill. 1986), both of which held that punitive damages are not recoverable under the Warsaw Convention.

The cases relied upon by Petitioners, all district court cases, are completely devoid of any analysis of the language and history of the Convention and display no effort to impart a meaning to the treaty consistent with the intent of the signatories. For example, in *Hill v. United Airlines*, 550 F. Supp. 1048, 1056 (D. Kan. 1982), the court denied defendant's summary judgment motion, holding simply that plaintiffs sufficiently pled a claim for wilful misconduct which

"might entitle plaintiffs to recover actual and punitive damages" in excess of the Convention's limits. The court there did not delve into the issue whether the Convention permits recovery of punitive damages. In this case, the trial court simply submitted the claim for punitive damages to the jury under the law of the forum, over KAL's objection, after the jury rendered its verdict of wilful misconduct. See App. at 2a-3a; 6a-7a. The trial court had failed to address the issue prior to that time, despite the pendency of KAL's motion to strike the punitive damage claims and offered no explanation or rationale for its decision, except to state:

. . . in the scheme of things, our view of the treaty differs from your view.

App. at 3a.

The only other district court to address the issue directly and conclude that punitive damages are recoverable under the Warsaw Convention was the district court in *In re Hijacking at Karachi International Airport, Pakistan on September 5, 1986*, 729 F. Supp. 17 (S.D.N.Y. 1990), a decision reversed by the Second Circuit in *Lockerbie*, 928 F.2d 1267 (2d Cir. 1991).

A review of the lower court decisions which have addressed the issue, even in passing or in *dicta*, reveals that the claimed conflict simply does not exist.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
August 1, 1989
9:41 a.m.

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

VOLUME 12

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

| | |
|------------------------|--|
| For the Plaintiffs: | DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ. |
| For the Defendant: | GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ. |
| Court Recorder: | Mary Thomas |
| Transcription Service: | Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042 |

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[1644] THE COURT: But those passengers who are involved in this litigation are parties plaintiff, are they not?

MR. TOMPKINS: No, there is a lot of duplication.

MR. SINCOFF: Your Honor, can we refer that—when you gave us dispensation to read the list of the decedents to the jury during the voir dire, 138 names of the passengers were read by Mr. Madole to the jury.

THE COURT: That is the figure you want to use?

MR. SINCOFF: Yes, Your Honor.

MR. TOMPKINS: I would have to check the accuracy of the number of passengers, Your Honor. I don't have that information available.

THE COURT: Well, that is the figure—if you agree on that figure, I have no problems with it, but I don't intend to have anybody not in this case participate in it. That makes no sense.

So when you get that figure, whether it is 138 or whatever it is, we will decide on it. Now you can put on the record now your objection to the whole business because I have been through that, but you know exactly why I am doing it, exactly, and I have no alternative.

MR. BARRY: Your Honor, pre-trial we made a motion pursuant to Rule 12H2 of the Federal Rules of Civil Procedure dismissing all claims for punitive damages as a matter of law.

We have submitted a Memorandum of Law in support of [1645] that, and I assume from this discussion that you are denying that Motion to Dismiss.

THE COURT: Your exception is very well-founded for the simple reason that if there is any basis for the opposition, that basis alone would be a cause for retrial, even if we get by all the other hurdles.

This is the only jury—this or anyone on the subject of retrial of the action, which would mean still another single jury, which that could be put in the nature of litigation, only one, and I can see no alternative to it.

If we don't get to that stage, then that is the way the thing was set up because they don't know anything about it at this juncture, nothing.

It is not like we wound it all in and then withdrew it from them. That would screw up the whole thing, as you well know.

They don't know anything about it, and that is the problem, and your memoranda are very well-written. I have read them, and I have gone around and around in my own mind and with my clerk about it, but in the scheme of things, in the scheme of things, our view of the treaty differs from your view.

MR. BARRY: I understand your ruling, Your Honor. I just wanted to make sure the record was clear. Now the other thing that I think Your Honor is going to have to deal with [1646] should the verdict come in against us and you submit this issue to the jury is what law is going to apply because this is a case—passengers against the airline are governed by the Warsaw Convention.

Now if you are going to have punitive damages, you are going to have to determine what law is applied, and Mr. Sincoff says that is not a—that under the law they are entitled to see corporate worth or whatever; my question is, What law?

And I think we are going to have to make a determination on that. I just—you know, yesterday in the conference the term “hornets’ nest” came up, and I think this fits into that category.

THE COURT: I don't understand. I don't follow you when you say what law.

MR. BARRY: Well, are we going to apply the law of the District of Columbia to Korean Air Lines? The issue of punitive damages for an accident that occurred on the high seas as a result of a shootdown by the Russians on a flight from New York to Seoul.

THE COURT: What law should I pick?

MR. BARRY: I don't know.

THE COURT: Where is the case being tried on the issue of liability?

MR. BARRY: Here in the District of Columbia.

[1647] THE COURT: With respect to damages, this aspect of damages which would ordinarily tail along with will be a part of an action on liability and damages, except for the construct of the treaty; I mean, what law would apply.

MR. BARRY: Well, Your Honor, I think you have to do a choice of law analysis, just as Judge Green did in the Air Florida litigation here on this very same issue, and she held that laws of differing jurisdictions were going to apply to different issues.

I don't know the answer to the question, to be very honest with you. You can make a ruling that the law of the District of Columbia applies. That is your ruling.

I am just not sure. I raise only a problem. I wasn't anticipating this, to tell you the truth.

THE COURT: When he constructed this whole multidistrict thing, there were a lot of problems they hadn't anticipated, and we have had to work them out, you know, case by case, year by year, with all kinds of analysis.

MR. BARRY: Anyhow, Your Honor, you have my exception.

THE COURT: And in a sense, we—pardon? Yes, and the record is very clear because your motion, your Points and Authorities, the opposition to your reply to it are all a matter of the complete record, and there is nothing in that that you withdraw concerning your opposition to this Court [1648] considering this whole matter.

MR. BARRY: Absolutely not.

THE COURT: That is all a matter of record, and I am not unwilling to listen to you restate it, but I am just saying that I think—

MR. BARRY: I see no reason to restate it, Your Honor.

THE COURT: The record is very clear.

MR. BARRY: It is set forth fully in our papers.

THE COURT: The record is very clear.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
August 2, 1989
2:15 p.m.

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983

VOLUME 13
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

| | |
|------------------------|--|
| For the Plaintiffs: | DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ. |
| For the Defendant: | GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ. |
| Court Recorder: | Mary Thomas |
| Transcription Service: | Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042 |

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[1680]

* * *

THE COURT: As I understand it, you cannot come to any agreement with respect to a figure. Under those circumstances, I think that the figure, then, can just be left out. I believe we had discussion with respect to this next phase. I want to make sure that that discussion we can put on the record or repeat any discussion that we had.

It is my understanding that your position was made very clear in the motions that were filed with respect to this issue. It is also my understanding that there were no additional arguments that you wanted to make in that connection. Am I correct, Counselor?

MR. BARRY: That is correct.

THE COURT: All right. So, if that is true, I think the state of the record will be that the positions of each side are a matter of record, as well as the Court's determination about presenting this issue to this jury. I do not think there will be any confusion on the record.

All right. There is one other thing. All right. Have the jury come in.

[1681] (Jury in.)

THE COURT: We have more work for you. I know you are surprised, and for reasons I cannot detail for you now, it was inadvisable, legally inadvisable, for you to consider the matter about which I am going to speak until certain other determinations had been made.

Now, because you have found that the action or inaction of KAL flight crew amounted to willful misconduct; and you have also found that the willful misconduct was the proximate cause of the passengers' deaths, I am now going to instruct you on punitive and exemplary damages. As I have already instructed you, other juries will determine plaintiffs' actual damages.

However, in addition to actual damages, the law permits the jury under certain circumstances to award an injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct, and to serve

as an example or warning to others not to engage in such conduct.

Now, because the decision whether to award punitive and exemplary damage depends upon the jury's view of the degree of the defendant's misconduct, and the juries that will be awarding actual damages will not be hearing the evidence on KAL's misconduct, the Court has determined that you should be the jury to determine whether punitive [1682] and exemplary damages should be awarded—and if so, how much should be awarded.

Having found willful misconduct by the flight crew of KAL and that such willful misconduct was the proximate cause of the passengers' death, you must now determine whether the acts that you found to have constituted willful misconduct were wantonly done. And if you find so, you may award as punitive and exemplary damages such amount as you shall unanimously agree to be proper.

Now, an act or failure to act is wantonly done if done in reckless or careless disregard of or indifference to the rights of one or more persons, including the injured person. Whether or not to make any award of punitive and exemplary damages, which will be in addition to the actual damages determined and awarded by other juries, is a matter that is exclusively within the province of this jury.

In contrast to actual damages which must be awarded when liability is determined, the decision to award punitive and exemplary damages is discretionary. It is dependent upon your judgment whether such damages are necessary to punish defendant for its extraordinary misconduct and to deter others from engaging in such conduct.

[1683] The decision whether to award punitive damages and exemplary damages and how much to award must be unanimous. You should bear in mind not only the conditions under which and the purposes for which the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason—and must never be either

awarded or fixed in amount because of any sympathy or bias or prejudice with respect to any party in the case.

If you unanimously determine that plaintiffs are entitled to punitive and exemplary damages, then you shall award a single sum, which single sum shall be divided equally between the plaintiffs in this action. If you unanimously determine that plaintiffs are not entitled to punitive and exemplary damages, then you shall return a verdict of no punitive damages on a Special Verdict Sheet that I will give you.

The Verdict Sheet is very simple. I will have copies of this simple instruction sent to you in a very few minutes. So you will retire to consider this matter about which I have just instructed you.

(The jury retired to deliberate at 2:30 p.m.)

* * *

[1687] (Jury in at 4:40 p.m.)

* * *

VERDICT

THE COURT: "We, the jury, unanimously determine that the plaintiffs are entitled to punitive damages in the amount of fifty million dollars." And this is signed by each of the members of the jury. Would you file this, please?

THE CLERK: Yes, Your Honor.